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2
3 UNITED STATES DISTRICT COURT
4 WESTERN DISTRICT OF WASHINGTON
5 AT TACOMA

6 KATHY K. GIBBS,

7 Plaintiff,

8 v.

9 MICHAEL J. ASTRUE, Commissioner of
10 Social Security,

11 Defendant.

Case No. C09-5114RJB-KLS

REPORT AND RECOMMENDATION

Noted for April 9, 2010

12
13 Plaintiff, Kathy K. Gibbs, has brought this matter for judicial review of the denial of her
14 applications for disability insurance and supplemental security income (“SSI”) benefits. This
15 matter has been referred to the undersigned Magistrate Judge pursuant to 28 U.S.C. §
16 636(b)(1)(B) and Local Rule MJR 4(a)(4) and as authorized by Mathews, Secretary of H.E.W. v.
17 Weber, 423 U.S. 261 (1976). After reviewing the parties’ briefs and the remaining record, the
18 undersigned submits the following Report and Recommendation for the Court’s review.
19

20 FACTUAL AND PROCEDURAL HISTORY

21 Plaintiff currently is 37 years old.¹ Tr. 28. She has a general equivalency diploma and
22 past relevant work experience as an optometric assistant. Tr. 25, 116, 125, 268, 286.

23 On April 28, 2004, plaintiff filed applications for disability insurance and SSI benefits,
24 alleging disability as of December 1, 2000, due to anxiety, chronic fatigue, depression, migraine
25

26 ¹ Plaintiff’s date of birth has been redacted in accordance with the General Order of the Court regarding
Public Access to Electronic Case Files, pursuant to the official policy on privacy adopted by the Judicial Conference
of the United States.

1 headaches, a nervous stomach, and a sweating problem. Tr. 16, 28, 61, 124-25. Her applications
2 were denied initially and on reconsideration. Tr. 16, 28-30, 50, 53. A hearing was held before an
3 administrative law judge (“ALJ”) on October 30, 2007, at which plaintiff, represented by
4 counsel, appeared and testified, as did a vocational expert. Tr. 265-89.

5 On January 24, 2008, the ALJ issued a decision, determining plaintiff to be not disabled,
6 finding specifically in relevant part:
7

- 8 (1) at step one of the sequential disability evaluation process,² plaintiff had not
9 engaged in substantial gainful activity since her alleged onset date of
10 disability;
- 11 (2) at step two, plaintiff had “severe” impairments consisting of an anxiety
12 disorder and a depressive disorder;
- 13 (3) at step three, none of plaintiff’s impairments met or medically equaled the
14 criteria of any of those listed in 20 C.F.R. Part 404, Subpart P, Appendix 1;
- 15 (4) after step three but before step four, plaintiff had the residual functional
16 capacity (“RFC”) to perform a full range of work at all exertional levels,
17 with certain other non-exertional limitations;
- 18 (5) at step four, plaintiff was unable to perform her past relevant work; and
- 19 (6) at step five, plaintiff was capable of performing other jobs existing in
20 significant numbers in the national economy.

21 Tr. 16-27. Plaintiff’s request for review was denied by the Appeals Council on January 9, 2009,
22 making the ALJ’s decision the Commissioner’s final decision. Tr. 3; 20 C.F.R. § 404.981, §
23 416.1481.

24 On March 4, 2009, plaintiff filed a complaint in this Court seeking review of the ALJ’s
25 decision. (Dkt. #1-#3). The administrative record was filed with the Court on June 10, 2009.

26 ² The Commissioner employs a five-step “sequential evaluation process” to determine whether a claimant
is disabled. See 20 C.F.R. § 404.1520; 20 C.F.R. § 416.920. If the claimant is found disabled or not disabled at any
particular step, the disability determination is made at that step, and the sequential evaluation process ends. Id.

1 (Dkt. #14). Plaintiff argues the ALJ's decision should be reversed and remanded to the
2 Commissioner for an award of benefits for the following reasons:

- 3 (a) the ALJ erred in evaluating the medical evidence in the record;
- 4 (b) the ALJ erred in assessing plaintiff's credibility;
- 5 (c) the ALJ erred in evaluating the lay witness evidence in the record;
- 6 (d) the ALJ erred in assessing plaintiff's residual functional capacity; and
- 7 (e) the ALJ erred in finding plaintiff capable of performing other work existing
8 in significant numbers in the national economy.

9 The undersigned agrees the ALJ erred in determining plaintiff to be not disabled, but, for the
10 reasons set forth below, recommends that while the ALJ's decision should be reversed, this
11 matter should be remanded to the Commissioner for further administrative proceedings. In
12 addition, although plaintiff requests oral argument in this matter, the undersigned finds such
13 argument to be unnecessary.
14

15 DISCUSSION

16 This Court must uphold the Commissioner's determination that plaintiff is not disabled if
17 the Commissioner applied the proper legal standard and there is substantial evidence in the
18 record as a whole to support the decision. Hoffman v. Heckler, 785 F.2d 1423, 1425 (9th Cir.
19 1986). Substantial evidence is such relevant evidence as a reasonable mind might accept as
20 adequate to support a conclusion. Richardson v. Perales, 402 U.S. 389, 401 (1971); Fife v.
21 Heckler, 767 F.2d 1427, 1429 (9th Cir. 1985). It is more than a scintilla but less than a
22 preponderance. Sorenson v. Weinberger, 514 F.2d 1112, 1119 n.10 (9th Cir. 1975); Carr v.
23 Sullivan, 772 F. Supp. 522, 524-25 (E.D. Wash. 1991). If the evidence admits of more than one
24 rational interpretation, the Court must uphold the Commissioner's decision. Allen v. Heckler,
25 749 F.2d 577, 579 (9th Cir. 1984).
26

1 I. The ALJ's Evaluation of the Medical Evidence in the Record

2 The ALJ is responsible for determining credibility and resolving ambiguities and
3 conflicts in the medical evidence. Reddick v. Chater, 157 F.3d 715, 722 (9th Cir. 1998). Where
4 the medical evidence in the record is not conclusive, "questions of credibility and resolution of
5 conflicts" are solely the functions of the ALJ. Sample v. Schweiker, 694 F.2d 639, 642 (9th Cir.
6 1982). In such cases, "the ALJ's conclusion must be upheld." Morgan v. Commissioner of the
7 Social Security Administration, 169 F.3d 595, 601 (9th Cir. 1999). Determining whether
8 inconsistencies in the medical evidence "are material (or are in fact inconsistencies at all) and
9 whether certain factors are relevant to discount" the opinions of medical experts "falls within this
10 responsibility." Id. at 603.

12 In resolving questions of credibility and conflicts in the evidence, an ALJ's findings
13 "must be supported by specific, cogent reasons." Reddick, 157 F.3d at 725. The ALJ can do this
14 "by setting out a detailed and thorough summary of the facts and conflicting clinical evidence,
15 stating his interpretation thereof, and making findings." Id. The ALJ also may draw inferences
16 "logically flowing from the evidence." Sample, 694 F.2d at 642. Further, the Court itself may
17 draw "specific and legitimate inferences from the ALJ's opinion." Magallanes v. Bowen, 881
18 F.2d 747, 755, (9th Cir. 1989).

20 The ALJ must provide "clear and convincing" reasons for rejecting the uncontradicted
21 opinion of either a treating or examining physician. Lester v. Chater, 81 F.3d 821, 830 (9th Cir.
22 1996). Even when a treating or examining physician's opinion is contradicted, that opinion "can
23 only be rejected for specific and legitimate reasons that are supported by substantial evidence in
24 the record." Id. at 830-31. However, the ALJ "need not discuss all evidence presented" to him or
25 her. Vincent on Behalf of Vincent v. Heckler, 739 F.3d 1393, 1394-95 (9th Cir. 1984) (citation
26

omitted) (emphasis in original). The ALJ must only explain why “significant probative evidence has been rejected.” Id.; see also Cotter v. Harris, 642 F.2d 700, 706-07 (3rd Cir. 1981); Garfield v. Schweiker, 732 F.2d 605, 610 (7th Cir. 1984).

In general, more weight is given to a treating physician’s opinion than to the opinions of those who do not treat the claimant. Lester, 81 F.3d at 830. On the other hand, an ALJ need not accept the opinion of a treating physician, “if that opinion is brief, conclusory, and inadequately supported by clinical findings” or “by the record as a whole.” Batson v. Commissioner of Social Security Administration, 359 F.3d 1190, 1195 (9th Cir. 2004); Thomas v. Barnhart, 278 F.3d 947, 957 (9th Cir. 2002); Tonapetyan v. Halter, 242 F.3d 1144, 1149 (9th Cir. 2001). An examining physician’s opinion is “entitled to greater weight than the opinion of a nonexamining physician.” Lester, 81 F.3d at 830-31. A non-examining physician’s opinion may constitute substantial evidence if “it is consistent with other independent evidence in the record.” Id. at 830-31; Tonapetyan, 242 F.3d at 1149.

A. Dr. Cosgrove

In early December 2004, plaintiff was evaluated by Lisa Cosgrove, D.O., who diagnosed plaintiff with moderate chronic, recurrent major depression without psychosis, a dysthymic disorder, an anxiety disorder not otherwise specified (“NOS”), and a global assessment of functioning (“GAF”) score of 40.³ Tr. 191. In terms of plaintiff’s prognosis, Dr. Cosgrove opined as follows:

³ A GAF score is “a subjective determination based on a scale of 100 to 1 of ‘the clinician’s judgment of the individual’s overall level of functioning.’” Pisciotta v. Astrue, 500 F.3d 1074, 1076 n.1 (10th Cir. 2007). “A GAF score of 31-40 is extremely low, and ‘indicates . . . major impairment in several areas, such as work or school, family relations, judgment, thinking, or mood.’” Salazar v. Barnhart, 468 F.3d 615, 624 n.4 (10th Cir. 2006) (quoting DSM-IV-TR at 32); see also Cox v. Astrue, 495 F.3d 614, 620 n.5 (8th Cir. 2007) (“[A] GAF score in the forties may be associated with a serious impairment in occupational functioning.”).

1 . . . Guarded providing the following. The claimant, at the end of the
2 interview expressed motivation to return to medication management and
3 psychotherapy. She appeared to express motivation to improve her condition.

4 With return to psychiatric treatment to include medication management and
5 psychotherapy improvement is likely to be seen in her depressive symptoms
6 within the next six months to a year. Also recommended would be a referral
7 to the [Washington State] Department of Vocational Rehabilitation to more
8 fully assess and assist this claimant in coping with a competitive work
9 environment.

10 Id. With respect to plaintiff's ability to function, Dr. Cosgrove also opined that:

11 . . . The claimant shows no impairment in cognition or judgment that would
12 preclude her from managing her funds independently should she be given
13 funding.

14 . . . At this time because of [sic] the claimant's neurovegetative symptoms of
15 depression and anxiety are untreated and very evident, it is likely that she
16 would have considerable difficulty even getting to work due to her anergia.
17 She would have difficulty, again due to anergia even managing simple and
18 repetitive tasks. Her ability to relate to the public, coworkers, and supervisors
19 also appears impaired due to her marked social withdrawal and isolation.

20 I do not see her as employable at this time, however, with the previous
21 recommendations, improvement in this might be seen within the next year.

22 Tr. 191-92.

23 After summarizing the above findings, the ALJ stated he was giving "[g]reat weight" to
24 Dr. Cosgrove's "assessment" that while plaintiff's "prognosis was considered guarded, she
25 expressed motivation to return to medication management and psychotherapy," and that "[w]ith
26 such treatment, improvement was expected within the next six months to a year," since it was
"generally consistent with the collective evidence of record." Tr. 24. Plaintiff argues the ALJ
erred here by ignoring or overlooking the assessed GAF score of 40, and because she was unable
to secure appropriate treatment and did not improve significantly. Defendant disagrees, arguing
the substantial evidence in the record shows such improvement did occur.

1 The undersigned agrees with plaintiff that the ALJ erred in evaluating Dr. Cosgrove's
2 findings, but disagrees that those findings clearly support a determination of disability. As
3 defendant points out, the record does show plaintiff experienced improvement on medication –
4 and on more than one occasion significant improvement (see Tr. 255 (plaintiff reporting
5 Clonazepam made her feel “awesome”); see also Tr. 232 (plaintiff stating her anxiety symptoms
6 were “well controlled” in past), Tr. 236 (plaintiff reporting she noticed significant difference
7 after dose of Celexa was increased); 239 (plaintiff stating her anxiety symptoms were well-
8 controlled on Clonazepam) – but not necessarily within the six-month to one year period noted
9 by Dr. Cosgrove. For example, although Dr. Cosgrove issued his evaluation report in early
10 December 2004, it is not until late June 2006, that plaintiff first mentioned experiencing such
11 improvement. Tr. 255. Accordingly, it is not at all clear that the significant improvement noted
12 in the record occurred during that period.
13

14
15 On the other hand, while plaintiff's reports subsequent to late June 2006, are somewhat
16 mixed concerning the amount of improvement she experienced (see Tr. 232, 236, 239), at least
17 one progress note reveals, as noted above, that in late January 2007, she reported “her anxiety
18 symptoms were well controlled in the past” (Tr. 232). Although no mention is made as to
19 exactly what period of time the phrase “in the past” actually is being referred to here, it certainly
20 could include the six months to one year period Dr. Cosgrove discussed in his evaluation report.
21 As such, it is entirely possible that significant improvement did occur during that period, which
22 would then form a proper reason for the ALJ to base his rejection of Dr. Cosgrove's findings and
23 opinions in regard to plaintiff's ability to work.
24

25 As for plaintiff's argument regarding the GAF score of 40 assessed by Dr. Cosgrove, the
26 undersigned finds the ALJ erred here as well. As noted above, a GAF score of 40 “is extremely

low,” indicating ““major impairment in several areas, such as work or school, family relations, judgment, thinking, or mood.”” Salazar, 468 F.3d at 624 n.4 (quoting DSM-IV-TR at 32). A GAF score is “relevant evidence” of a claimant’s ability to function mentally. England v. Astrue, 490 F.3d 1017, 1023, n.8 (8th Cir. 2007). As such, it constitutes significant probative evidence the ALJ should have addressed in analyzing Dr. Cosgrove’s evaluation report.

Nevertheless, even though a GAF score may be “of considerable help” to the ALJ in, for example, assessing a claimant’s RFC, “it is not essential” to the accuracy thereof. Howard v. Commissioner of Social Security, 276 F.3d 235, 241 (6th Cir. 2002). Thus, an ALJ’s “failure to reference the GAF score,” would not “standing alone” result in a residual functional capacity assessment being inaccurate. Id. That is, the mere fact that a low GAF score may have been assessed is not in itself sufficient to establish disability. Accordingly, while the ALJ erred here, he was not necessarily required to adopt the GAF score of 40, let alone find that plaintiff was disabled based on that score.

B. Dr. Crist

Plaintiff also was examined by Robert Crist, M.D., in early December 2004, at which time she was diagnosed with chronic anxiety and depression with panic disorder and agoraphobia, a panic disorder secondary thereto, chronic fatigue syndrome also secondary to the two previous diagnoses, and chronic muscle contraction headaches. Tr. 184. Dr. Crist also provided the following functional assessment:

. . . It is my belief that the claimant could ambulate and stand 6-8 hours . . .

She could be expected to sit six or eight hours without restrictions.

Assistive devices are not necessary.

The claimant can lift and carry, I think, 10-20 pounds frequently without difficulty. If she is limited it would only be due to fatigue and deconditioning.

1 I believe she would not have any specific postural limitations on bending,
2 stooping, or crouching.

3 No manipulative limitations would be expected. It would appear that she has
4 no restrictions on reaching, handling, feeling, grasping, or fingering.

5 Environmental limitations would be secondary to her underlying panic
6 disorder and depression and the accompanying chronic fatigue that she
7 experiences. Because she feels so agoraphobic, she is hesitant to get outside
8 of her home. This is an exceedingly limiting factor.

8 Tr. 184-85.

9 The ALJ stated he was giving “[g]reat weight” to “the opinion of Dr. Crist with respect
10 to” plaintiff’s “physical residual functional capacity,” as it was “based on actual observation of”
11 plaintiff. Tr. 24. However, the ALJ stated he was giving only “limited weight” to Dr. Crist’s
12 assessment of plaintiff’s “mental health status and its affect on her ability to engage in work
13 activity,” as it was “outside his area of expertise.” Id. Plaintiff argues the ALJ erred in rejecting
14 Dr. Crist’s assessment of her mental health status, because, as a medical doctor, he was
15 competent to provide an opinion with respect to both his physical and mental condition. The
16 undersigned agrees.

17
18 It is true, as defendant points out, that an ALJ may give more deference to the “opinion of
19 a specialist about medical issues related to his or her area of specialty” than to that of a medical
20 source who is not specialist. Benecke v. Barnhart, 379 F.3d 587, 594 n.4 (9th Cir. 2004) (citing
21 20 C.F.R. § 404.1527(d)(5)). An ALJ, however, may not give less deference to an examining
22 physician merely because he or she is not a specialist. That is, although defendant contends that
23 the ALJ gave more weight to the opinions of the psychiatrists or psychologists in the record, the
24 ALJ did not state he was discounting Dr. Crist’s assessment on the basis of their specialization in
25 the area of mental health. In addition, even if such a finding can be implied from the language of
26

the ALJ's decision, as discussed elsewhere herein the ALJ also erred in evaluating the opinions of those medical sources in the record who had mental health expertise.

C. Dr. Kuhner and Dr. Houck

A psychiatric review technique form was completed by Ben Kuhner, M.D., in early February 2005, and affirmed by Trevelyan Houck, Ph.D., in late April 2005, in which plaintiff was diagnosed with major depression and an anxiety disorder, NOS. Tr. 200, 202. In addition, Drs. Kuhner and Houck found plaintiff had moderate restrictions in her activities of daily living, moderate difficulties in maintaining social functioning, moderate difficulties in maintaining concentration, persistence or pace, and no episodes of decompensation of extended duration. Tr. 207. Also completed by Dr. Kuhner in early February 2005, and affirmed by Dr. Houck in late April 2005, was a mental residual functional capacity assessment form, in which plaintiff more specifically was found to be moderately limited in her ability to:

- remember locations and work-like procedures;
- understand, remember and carry out detailed instructions;
- maintain attention and concentration for extended periods;
- perform activities within a schedule;
- maintain regular attendance;
- be punctual within customary tolerances;
- complete a normal workday and workweek without interruptions from psychologically based symptoms;
- perform at a consistent pace without an unreasonable number and length of rest periods;
- interact appropriately with the general public;
- respond appropriately to changes in the work setting;
- travel in unfamiliar places or use public transportation; and
- set realistic goals or make plans independently of others.

Tr. 193-94. In the narrative portion of that form, Drs. Kuhner and Houck further found plaintiff still retained "the cognitive ability to do SRT [simple routine and/or repetitive tasks]" and "some detailed tasks." Tr. 196. They opined as well that plaintiff should not work with the public,

1 could “avoid normal hazards,” had “poor motivation,” and would not “set long range goals on a
2 regular basis.” Id.

3 The ALJ stated in his decision that he was affording the opinions of Dr. Kuhner and Dr.
4 Houck “great weight,” as they “made determinations consistent with the evidence presented.” Tr.
5 25. Plaintiff argues the ALJ erred by not giving any reasons for failing to adopt many of the
6 mental functional limitations Drs. Kuhner and Houck found, even though he had afforded their
7 opinions great weight. Once more, the undersigned agrees. The ALJ assessed plaintiff with the
8 following mental residual functional capacity:
9

10 **... the claimant’s ability to interact and get along with the general public**
11 **is limited to brief and superficial contact. Her ability to respond**
12 **appropriately to changes in the work setting is moderately limited. Her**
13 **ability to complete a normal workday and workweek without**
14 **interruptions from psychologically based symptoms and to perform at a**
15 **consistent pace without an unreasonable number and length of rest**
16 **periods is moderately limited.**

17 Tr. 20 (emphasis in original). Clearly, this assessment fails to adequately account for a number
18 of the moderate limitations Dr. Kuhner and Dr. Houck found.

19 Defendant argues the ALJ did not err here, asserting it is the statements contained in the
20 narrative portion of the mental residual functional capacity assessment form that the ALJ’s own
21 mental residual functional capacity assessment should be compared to, and not the more specific
22 limitations listed above. But defendant provides no legal basis for why this should be so, or why
23 the statements contained in the narrative section are more credible or reliable. Nor, to the extent
24 he did rely on those statements, did the ALJ explain why he did so. The undersigned, therefore,
25 finds the ALJ erred in evaluating this medical evidence.
26

1 II. The ALJ's Assessment of Plaintiff's Credibility

2 Questions of credibility are solely within the control of the ALJ. Sample v. Schweiker,
3 694 F.2d 639, 642 (9th Cir. 1982). The Court should not "second-guess" this credibility
4 determination. Allen, 749 F.2d at 580. In addition, the Court may not reverse a credibility
5 determination where that determination is based on contradictory or ambiguous evidence. Id. at
6 579. That some of the reasons for discrediting a claimant's testimony should properly be
7 discounted does not render the ALJ's determination invalid, as long as that determination is
8 supported by substantial evidence. Tonapetyan v. Halter, 242 F.3d 1144, 1148 (9th Cir. 2001).

10 To reject a claimant's subjective complaints, the ALJ must provide "specific, cogent
11 reasons for the disbelief." Lester v. Chater, 81 F.3d 821, 834 (9th Cir. 1996) (citation omitted).
12 The ALJ "must identify what testimony is not credible and what evidence undermines the
13 claimant's complaints." Id.; Dodrill v. Shalala, 12 F.3d 915, 918 (9th Cir. 1993). Unless
14 affirmative evidence shows the claimant is malingering, the ALJ's reasons for rejecting the
15 claimant's testimony must be "clear and convincing." Lester, 81 F.2d at 834. The evidence as a
16 whole must support a finding of malingering. O'Donnell v. Barnhart, 318 F.3d 811, 818 (8th Cir.
17 2003).

19 In determining a claimant's credibility, the ALJ may consider "ordinary techniques of
20 credibility evaluation," such as reputation for lying, prior inconsistent statements concerning
21 symptoms, and other testimony that "appears less than candid." Smolen v. Chater, 80 F.3d 1273,
22 1284 (9th Cir. 1996). The ALJ also may consider a claimant's work record and observations of
23 physicians and other third parties regarding the nature, onset, duration, and frequency of
24 symptoms. Id.

1 Plaintiff argues the ALJ failed to provide clear and convincing reasons for discounting
2 her credibility. The undersigned disagrees. For example, the ALJ noted:

3 . . . Although she complained of an inability to remain focused, the claimant
4 was able to respond appropriately to questions posed during the hearing. She
5 did not ask to have questions repeated and she did not require redirection. . . .

6 Tr. 22. An ALJ may rely on a claimant's demeanor at the hearing as a basis for discrediting his
7 or her testimony. Thomas v. Barnhart, 278 F.3d 947, 960 (9th Cir. 2002); Matney v. Sullivan,
8 981 F.2d 1016, 1020 (9th Cir. 1992). Inclusion of personal observations of the claimant in the
9 ALJ's findings thus "does not render the decision improper." Nyman v. Heckler, 779 F.2d 528,
10 531 (9th Cir. 1986). However, the ALJ may not reject a claimant's subjective complaints "solely
11 on the basis of" personal observations. SSR 95-5p, 1995 WL 670415 *2. As discussed below,
12 the ALJ provided other valid reasons for discounting plaintiff's credibility.

13 An ALJ may discount a claimant's credibility on the basis of medical improvement. See
14 Morgan v. Commissioner of Social Sec. Admin., 169 F.3d 595, 599 (9th Cir. 1999); Tidwell v.
15 Apfel, 161 F.3d 599, 601 (9th Cir. 1998). In this case, the ALJ noted plaintiff reported she was
16 "much improved" on medication in early October 2002. Tr. 23, 153. The record contains other
17 documentation of reported medical improvement as well, despite also containing reports of
18 plaintiff having experienced side effects on some medications. See Tr. 145, 152, 154, 181, 219,
19 232, 236, 239, 255.

20 Failure to assert a good reason for not seeking or following a prescribed course of
21 treatment, or a finding by the ALJ that a proffered reason for failing to do so is not believable,
22 also "can cast doubt on the sincerity of the claimant's pain testimony." Fair v. Bowen, 885 F.2d
23 597, 603 (9th Cir. 1989). Here, the ALJ noted that while plaintiff had been "advised to continue
24 with the use of Celexa" in early October 2002 – which, as noted above, caused her to be "much
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26

1 improved” in terms of her anxiety – she reported in late January 2003, “having tapered herself
2 off of” it. Tr. 23, 153-54. Indeed, as further evidence of the efficacy of that medication, plaintiff
3 also “described her symptoms as feeling cloudy” and stated that she could feel her “nerves and
4 blood dancing along her arms and veins” at that time. Tr. 154 (though still reporting she was not
5 having racing heartbeat as she had in past). In addition, the ALJ noted that despite being given a
6 referral for mental health counseling in late January 2003, plaintiff did not seek such counseling
7 until more than a year later in early June 2004, and that by late July 2004, her “case was closed .
8 . . because she failed to make any appointments.” Tr. 23, 154, 162-70, 172-73.

10 Plaintiff argues her failure to maintain mental health treatment was consistent with her
11 mental health condition, noting that the Ninth Circuit has stated that the fact that a claimant does
12 “not seek treatment for a mental disorder until late in the day” is not a proper basis upon which
13 to discount the accuracy of a medical source’s assessment thereof. Nguyen v. Chater, 100 F.3d
14 1462, 1465 (9th Cir. 1996) (noting those with depression often do not recognize their condition
15 reflects potentially serious mental illness) (citing Blankenship v. Bowen, 874 F.2d 1116, 1124
16 (6th Cir.1989) (holding invalid ALJ’s rejection of claimant’s assertions concerning depression
17 due to failure to seek psychiatric treatment, finding questionable practice of chastising one with
18 mental impairment for exercise of poor judgment in seeking rehabilitation)). Here, though, the
19 ALJ did not discount any medical source’s opinion on this basis, nor is there any evidence in the
20 record that plaintiff’s mental condition caused her to not seek treatment.

23 Plaintiff also faults the ALJ for discounting her credibility in part on her activities of
24 daily living. To determine whether a claimant’s symptom testimony is credible, the ALJ may
25 consider his or her daily activities. Smolen, 80 F.3d at 1284. Such testimony may be rejected if
26 the claimant “is able to spend a substantial part of his or her day performing household chores or

1 other activities that are transferable to a work setting.” Id. at 1284 n.7. The claimant need not be
2 “utterly incapacitated” to be eligible for disability benefits, however, and “many home activities
3 may not be easily transferable to a work environment.” Id.

4 It is not at all clear that the ALJ discounted plaintiff’s credibility on this basis. See Tr. 21-
5 22 (summarizing testimony of plaintiff and report of plaintiff’s mother regarding plaintiff’s daily
6 activities). Even if the ALJ did present this as a reason for discounting plaintiff’s credibility, and
7 even if substantial evidence did not support the ALJ in doing so, the fact that one of the reasons
8 for discounting a claimant’s credibility may be improper, does not render the ALJ’s credibility
9 determination invalid, as long as it is supported by substantial evidence in the record, as it is in
10 this case for the reasons stated herein. Tonapetyan, 242 F.3d at 1148.

12 The undersigned further notes the ALJ found that although plaintiff “reported that she . . .
13 received treatment through Pacific Walk-In Clinic and St. Peter Family Practice,” both facilities,
14 in response to the ALJ’s request for clinical records, responded that she “had never been treated”
15 at either facility. Tr. 23. This is yet another valid reason upon which the ALJ based his adverse
16 credibility determination. See Smolen, 80 F.3d at 1284 (ALJ may consider ordinary techniques
17 of credibility evaluation, such as prior inconsistent statements and other testimony that appears
18 less than candid). The fact that plaintiff was never treated at those facilities clearly contradicts
19 her own self-reports that she had received treatment there.

21 III. The ALJ’s Evaluation of the Lay Witness Evidence in the Record

22 Lay testimony regarding a claimant’s symptoms “is competent evidence that an ALJ must
23 take into account,” unless the ALJ “expressly determines to disregard such testimony and gives
24 reasons germane to each witness for doing so.” Lewis v. Apfel, 236 F.3d 503, 511 (9th Cir.
25 2001). In rejecting lay testimony, the ALJ need not cite the specific record as long as “arguably
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1 germane reasons” for dismissing the testimony are noted, even though the ALJ does “not clearly
2 link his determination to those reasons,” and substantial evidence supports the ALJ’s decision.
3 Id. at 512. The ALJ also may “draw inferences logically flowing from the evidence.” Sample,
4 694 F.2d at 642.

5 The record contains a questionnaire completed by plaintiff’s mother, in which she related
6 her observations of plaintiff’s symptoms and limitations. See Tr. 99-107. Plaintiff argues that
7 while the ALJ summarized what plaintiff’s mother related therein (see Tr. 22), he failed to state
8 what weight, if any, he gave thereto. The undersigned agrees the ALJ erred here. To the extent
9 the ALJ did not adopt the limitations related by plaintiff’s mother – and it appears the ALJ did
10 not do so with respect to at least some of those limitations – he was required to provide germane
11 reasons for rejecting them. None, however, were provided.

12 Defendant argues the Court can and should reasonably infer from the rest of the ALJ’s
13 decision that he rejected any such limitations not consistent with his assessment of plaintiff’s
14 residual functional capacity. While it does seem apparent, as noted above, that the ALJ rejected
15 some or all of the limitations plaintiff’s mother reported as they were not included in the residual
16 functional capacity assessment, the point is the ALJ still must provide germane reasons for doing
17 so. Lastly, defendant asserts that none of plaintiff’s mother’s statements actually contradict any
18 of the limitations contained in that assessment. But, to name just a few examples, she stated that
19 plaintiff had to re-read written instructions due to issues with concentration, that it was hard for
20 her to follow spoken instructions, and that authority figures made her “very uncomfortable.” Tr,
21 104. None of these were accounted for by the ALJ in his decision.⁴
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26 ⁴ Defendant asserts the ALJ acknowledged plaintiff had moderate limitations in regard to her ability to maintain attention and perform at a consistent pace, but a plain reading of his assessment of her residual functional capacity shows that he only found so with respect to performing at a consistent pace. See Tr. 20.

1 IV. The ALJ's Assessment of Plaintiff's Residual Functional Capacity

2 If a disability determination "cannot be made on the basis of medical factors alone at step
3 three of the evaluation process," the ALJ must identify the claimant's "functional limitations and
4 restrictions" and assess his or her "remaining capacities for work-related activities." SSR 96-8p,
5 1996 WL 374184 *2. A claimant's residual functional capacity assessment is used at step four to
6 determine whether he or she can do his or her past relevant work, and at step five to determine
7 whether he or she can do other work. *Id.* It thus is what the claimant "can still do despite his or
8 her limitations." *Id.*

10 A claimant's RFC is the maximum amount of work the claimant is able to perform based
11 on all of the relevant evidence in the record. *Id.* However, a claimant's inability to work must
12 result from his or her "physical or mental impairment(s)." *Id.* Thus, the ALJ must consider only
13 those limitations and restrictions "attributable to medically determinable impairments." *Id.* In
14 assessing a claimant's residual functional capacity, the ALJ also is required to discuss why the
15 claimant's "symptom-related functional limitations and restrictions can or cannot reasonably be
16 accepted as consistent with the medical or other evidence." *Id.* at *7.

18 Here, the ALJ assessed plaintiff with the following residual functional capacity:

19 **... the claimant has the residual functional capacity to perform a full**
20 **range of work at all exertional levels. However, the claimant's ability to**
21 **interact and get along with the general public is limited to brief and**
22 **superficial contact. Her ability to respond appropriately to changes in**
23 **the work setting is moderately limited. Her ability to complete a normal**
24 **workday and workweek without interruptions from psychologically**
25 **based symptoms and to perform at a consistent pace without an**
26 **unreasonable number and length of rest periods is moderately limited.**

Tr. 20. Plaintiff argues that because the ALJ erred in evaluating the medical and lay witness
evidence in the record, and because he erred in assessing her credibility, this RFC assessment is
flawed. The undersigned agrees that given the ALJ's errors in evaluating the medical and lay

1 witness evidence in the record, although not in regard to plaintiff's credibility, it cannot be said
2 with any certainty that his assessment of her residual functional capacity was entirely accurate.
3 As such, the ALJ erred here as well.

4 V. The ALJ's Step Five Analysis

5 If a claimant cannot perform his or her past relevant work, at step five of the disability
6 evaluation process the ALJ must show there are a significant number of jobs in the national
7 economy the claimant is able to do. Tackett v. Apfel, 180 F.3d 1094, 1098-99 (9th Cir. 1999); 20
8 C.F.R. § 404.1520(d), (e), § 416.920(d), (e). The ALJ can do this through the testimony of a
9 vocational expert or by reference to the Commissioner's Medical-Vocational Guidelines (the
10 "Grids"). Tackett, 180 F.3d at 1100-1101; Osenbrock v. Apfel, 240 F.3d 1157, 1162 (9th Cir.
11 2000).
12

13 An ALJ's findings will be upheld if the weight of the medical evidence supports the
14 hypothetical posed by the ALJ. Martinez v. Heckler, 807 F.2d 771, 774 (9th Cir. 1987); Gallant
15 v. Heckler, 753 F.2d 1450, 1456 (9th Cir. 1984). The vocational expert's testimony therefore
16 must be reliable in light of the medical evidence to qualify as substantial evidence. Embrey v.
17 Bowen, 849 F.2d 418, 422 (9th Cir. 1988). Accordingly, the ALJ's description of the claimant's
18 disability "must be accurate, detailed, and supported by the medical record." Embrey, 849 F.2d
19 at 422 (citations omitted). The ALJ, however, may omit from that description those limitations
20 he or she finds do not exist. Rollins v. Massanari, 261 F.3d 853, 857 (9th Cir. 2001).
21
22

23 At the hearing, the ALJ posed a hypothetical question containing substantially the same
24 limitations as he included in his assessment of plaintiff's residual functional capacity, except that
25 he also added a limitation to "simple, repetitive type work." Tr. 286-87. In response thereto, the
26 vocational expert ("VE") testified that an individual with those limitations and plaintiff's age,

1 education and past work history, would be able to perform other jobs. Id. Based on the VE's
2 testimony, the ALJ found plaintiff to be capable of performing other work existing in significant
3 numbers in the national economy. Tr. 26-27.

4 Plaintiff argues the ALJ erred in so finding, asserting first that the vocational expert did
5 not in fact find her to be able to perform other jobs with the above limitations, but only testified
6 that she could perform such jobs in response to the sole limitation to "simple, repetitive type
7 work." The undersigned, however, finds this argument to be wholly without merit and a clear
8 misreading of the hearing testimony, which reads in relevant part:
9

10 [ALJ] Let me pose you a hypothetical. If somebody had a person
11 born [on plaintiff's birth date], has a GED, prior occupations are the two
12 occupations you mentioned, and add the following limitations. Would be
13 restricted to simple, repetitive type work, and the ability to interact and get
14 along with the general public would be limited to brief and superficial contact,
15 ability to respond appropriately to changes in the work setting is moderately
16 limited, ability to complete a normal work day and work week without
interruption from psychologically based symptoms and to perform at a
consistent pace without an unreasonable number and length of rest periods is
moderately limited. Can such a person be employed in any of her prior
relevant work?

17 [VE] No.

18 [ALJ] Any other occupations listed in the DOT?

19 [VE] No.

20 [ALJ] None within the DOT? No simple repetitive type --

21 [VE] Simple repetitive, it was the moderate ability that I was a little
22 concerned about. The only other, cleaner would be one, which is a light,
23 simple repetitive, unskilled.

24 [ALJ] How many such jobs in the national economy?

25 [VE] About 400,000.

26 [ALJ] Okay. Any other occupations?

1 [VE] The other one would possibly be light assembler, which is
2 considered unskilled and light, and there's about 26, 000.

3 Tr. 286-87. The most logical interpretation of this testimony is not that it shows the vocational
4 expert was responding to two different hypothetical questions posed by the ALJ – i.e., one with
5 all the limitations the ALJ described and a second one containing just the limitation to simple,
6 repetitive type work – but that she merely had modified her response to the original hypothetical
7 question based on further clarification by the ALJ.

8 Plaintiff further argues she should be found to be disabled at step five of the sequential
9 disability evaluation process, because the vocational expert also testified that when an additional
10 restriction – that the individual “would have difficulty managing even simple repetitive tasks”
11 (Tr. 288) – was added to the ALJ’s hypothetical, such an individual would not be able to perform
12 any of the jobs identified. Actually, in response to that question, the vocational expert testified
13 that the cleaner job could be performed, but that if the individual could not even perform simple,
14 repetitive tasks, he or she would be unable to perform any of them. Tr. 288. But it is not at all
15 clear such a severe limitation is supported by the substantial evidence in the record, and thus the
16 ALJ was not necessarily required to accept this additional testimony. Nevertheless, because, as
17 discussed above, the ALJ did err in evaluating both the medical and lay witness evidence in the
18 record, as well as in assessing plaintiff’s residual functional capacity, it also is not at all clear that
19 the hypothetical question the ALJ posed was accurate, and therefore that plaintiff would be able
20 to perform the jobs identified.

23 VI. This Matter Should Be Remanded for Further Administrative Proceedings

24 The Court may remand this case “either for additional evidence and findings or to award
25 benefits.” Smolen, 80 F.3d at 1292. Generally, when the Court reverses an ALJ’s decision, “the
26 proper course, except in rare circumstances, is to remand to the agency for additional

1 investigation or explanation.” Benecke v. Barnhart, 379 F.3d 587, 595 (9th Cir. 2004) (citations
2 omitted). Thus, it is “the unusual case in which it is clear from the record that the claimant is
3 unable to perform gainful employment in the national economy,” that “remand for an immediate
4 award of benefits is appropriate.” Id.

5 Benefits may be awarded where “the record has been fully developed” and “further
6 administrative proceedings would serve no useful purpose.” Smolen, 80 F.3d at 1292; Holohan
7 v. Massanari, 246 F.3d 1195, 1210 (9th Cir. 2001). Specifically, benefits should be awarded
8 where:
9

10 (1) the ALJ has failed to provide legally sufficient reasons for rejecting [the
11 claimant’s] evidence, (2) there are no outstanding issues that must be resolved
12 before a determination of disability can be made, and (3) it is clear from the
13 record that the ALJ would be required to find the claimant disabled were such
14 evidence credited.

15 Smolen, 80 F.3d 1273 at 1292; McCartey v. Massanari, 298 F.3d 1072, 1076-77 (9th Cir. 2002).
16 Because issues remain regarding the medical and lay witness evidence in the record, plaintiff’s
17 residual functional capacity and her ability to perform other work existing in significant numbers
18 in the national economy, remand of this matter to the Commissioner for further administrative
19 proceedings is appropriate.

20 Plaintiff argues the medical evidence in the record the ALJ erred in evaluating should be
21 credited as true. Where the ALJ has failed “to provide adequate reasons for rejecting the opinion
22 of a treating or examining physician,” that opinion generally is credited “as a matter of law.”
23 Lester, 81 F.3d at 834 (citation omitted). However, where the ALJ is not required to find the
24 claimant disabled on crediting of evidence, this constitutes an outstanding issue that must be
25 resolved, and thus the Smolen test will not be found to have been met. Bunnell v. Barnhart, 336
26 F.3d 1112, 1116 (9th Cir. 2003). Further, “[i]n cases where the vocational expert has failed to

1 address a claimant's limitations as established by improperly discredited evidence," the Ninth
2 Circuit "consistently [has] remanded for further proceedings rather than payment of benefits."
3 Bunnell, 336 F.3d at 1116. Such is the case here.

4 CONCLUSION

5 Based on the foregoing discussion, the Court should find the ALJ improperly concluded
6 plaintiff was not disabled, and should reverse the ALJ's decision and remand this matter to the
7 Commissioner for further administrative proceedings in accordance with the findings contained
8 herein.
9

10 Pursuant to 28 U.S.C. § 636(b)(1) and Federal Rule of Civil Procedure ("Fed. R. Civ. P.")
11 72(b), the parties shall have ten (10) days from service of this Report and Recommendation to
12 file written objections thereto. See also Fed. R. Civ. P. 6. Failure to file objections will result in
13 a waiver of those objections for purposes of appeal. Thomas v. Arn, 474 U.S. 140 (1985).
14 Accommodating the time limit imposed by Fed. R. Civ. P. 72(b), the clerk is directed set this
15 matter for consideration on **April 9, 2010**, as noted in the caption.
16

17 DATED this 8th day of March, 2010.

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20 
21 Karen L. Strombom
22 United States Magistrate Judge
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